in full view. Held that, under these circumstances, the trainmen had a right to presume that decedent would stop, and not go on the track.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 41, Railroads, § 1016.]

5. Same.—In an action against a railroad for the death of the driver of a vehicle at a crossing, the fact that decedent's wagon had almost gotten over the crossing when it was struck, and that, if the train had been checked a little earlier, there would have been no collision, could not render defendant liable, in the absence of evidence that the trainmen failed to exercise ordinary care to avoid the accident after decedent left a place of safety and started on the crossing.

DURBIN *v.* ROANOKE BLDG. CO. et al.

Sept. 10, 1908.

[62 S. E. 339.]

1. Equity—Bill of Review—Cumulative Evidence.—Where, on the first hearing of a suit, it was held on appeal that there was no evidence at all on a certain issue, a bill of review founded on after-discovered evidence on that issue should not be refused on the ground that the evidence is cumulative.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 19, Equity, § 1092.]

2. Same—Newly Discovered Evidence—Requisites.—A bill of review founded on newly discovered evidence, showing the discovery of evidence after the final decree was rendered and affirmed, which could not have been discovered before by the exercise of reasonable diligence, and which is not merely cumulative and is material and such as, if true, ought to produce on another hearing a different result on the merits, entitles complainant to a rehearing.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 19, Equity, §§ 1091-1094.]

WILLIAMS' ADM'R *v.* NORTON COAL CO.

Sept. 10, 1908.

[62 S. E. 342.]

1. Master and Servant—Defective Machinery—Proximate Cause.—Recovery cannot be had against an employer for injury to an employee on account of defective machinery, unless the defect was the proximate cause of the injury.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 34, Master and Servant, § 162.]

2. Same—Mines—Motormen—Contributory Negligence.—A motorman in a mine was guilty of contributory negligence barring re-

covery for his death, which was caused, while he was backing the motor with the trolley pole in front, by the pole leaving the wire, resulting in roof supports being knocked down and slate falling upon him, regardless of the company's rule prohibiting "back poling" and of its knowledge of customary violations of the rule, and though the pole left the wire because the trolley wheel was defective; "back poling" in mines being extremely and obviously dangerous, and the usual and proper method merely involving turning the pole so that it will trail behind the motor, thus avoiding all risk of danger on the pole leaving the wire.

EPPERSON *v.* EPPERSON et al.

Sept. 10, 1908.

[62 S. E. 344.]

1. **Equity—Jurisdiction—Nature of Proceeding.**—A proceeding by original bill, by the assignee of an obligor in a contract for support, which contract provided for the conveyance of land to obligor and his brother on condition that they support their parents, for a construction of the contract and a determination of the relative rights in the land of the assignee and the obligee in the contract who was in possession of the land, with an amended bill seeking to enjoin the obligee's cutting of timber thereon, comes within the jurisdiction of a court of equity; the original bill partaking of the nature of a suit for specific performance, and the amended bill seeking injunctive relief against irreparable damages to the freehold.

2. **Same—Necessary Parties—Admission on Own Initiative.**—The brother of the assignor of the contract and his co-obligor, being a party to the original transaction, was a necessaray party to the litigation, and he, being omitted as a party to the original and amended bills, was properly admitted as a party defendant on his own initiative without formal amendment, and permitted to file an answer; no injustice being occasioned thereby.

3. **Deeds—"Defeasance"—Stipulation for Avoidance of Agreement in Separate Instrument.**—Where a deed of land conveyed in consideration of a contract for support, and a stipulation for the avoidance of the agreement in case of failure to perform the contract embraced in a separate instrument form parts of one transaction, the stipulation for avoidance constitutes a defeasance.

4. **Words and Phrases—"Defeasance"—"Condition."**—An instrument which defeats the force or operation of some other deed or of an estate is a defeasance; but, if the provision is in the same deed, it is a condition.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1394-1400, 1930-1931.]